Informatieplichten. Over kennis en verantwoordelijkheid in contractenrecht en buitencontractueel aansprakelijkheidsrecht

Jansen, K.J.O.

Summary

Information duties

1 Introduction

Information duties – duties to gather or to provide information – represent the connecting link between knowledge and responsibility in the law of obligations (section 1.1). This study aims at a comparison of (pre)contractual and noncontractual information duties. Its goal is to assess how courts nowadays connect civil responsibility to human knowledge (section 1.2). Chapter 2 contains a general introduction of the subject. Chapters 3 and 4 present a systematic analysis of information duties in contract law and noncontractual liability law. Chapter 5 draws conclusions from a general perspective about the role of information duties in the law of obligations.

2 Exploration of the subject matter

Information duties have been known for ages, but it is only since the second half of the twentieth century that they seem to be considered as a separate legal issue within the law of obligations (section 2.1.1). Information duties do not have a single statutory basis in Dutch law (section 2.2.1). As far as they are based upon unwritten law, e.g. upon reasonableness and fairness, good faith, common opinion or generally accepted standards, their contents should be uniform (section 2.2.4).

Two main types of information duties are the *duty to investigate* on the one hand, obliging the responsible party to gather information in his own interest, and the *duty of disclosure* or the *duty to warn* on the other hand, obliging the responsible party to provide information in the interest of the other party (section 2.3.1). For the sake of clarity and coherence, it is important to equalize duties of disclosure and duties to warn as far as possible (section 2.3.2).

Information duties aim to promote well-informed behaviour. They ensure that people can take future decisions on the basis of adequate information (section 2.3.3). Information duties have a derivative character, since they originate from a (pre)contractual or noncontractual relationship between the parties involved. They can be qualified as 'Obliegenheiten' (section 2.4.1). For

practical reasons, compliance with information duties cannot be enforced in advance (section 2.4.2).

Comparative legal research shows that during the twentieth century, the importance of information duties – especially precontractual duties of disclosure – has grown throughout Europe (section 2.5.1). French, German and English law offer three representative perspectives. In England, the courts have so far stuck to the principle that individuals have their own responsibility with regard to the gathering of information, and, consequently, that there is no general duty of disclosure (section 2.8.1 et seq.). In France, on the other hand, the courts try to create a high level of (consumer) protection through 'categorial' constructions, often aimed at the relationship between businesses and consumers (section 2.6.1 et seq.). German law, like Dutch law, chooses the middle of the road (section 2.7.1 et seq.). In European private law, information duties play an important role as well (section 2.9.1 et seq.). However, there seems to be no general European consensus on the subject matter of this study (section 2.9.5).

3 Information duties in contract law

Contract law is dominated by the idea that people choosing to negotiate a contract have to communicate with each other in an adequate manner (section 3.1.1). With regard to this communication, individual autonomy serves as the guiding principle (section 3.1.2).

Formation of contracts

Within the scope of the formation of contracts, information duties first of all play a role in determining the intention of the parties under articles 3:33-3:35 of the Dutch Civil Code (DCC). Article 3:35 in connection with article 3:11 DCC refers to a *duty to investigate* the intention of a party entering into a contract. This duty depends in particular on the foreseeability of prejudice from the perspective of the responsible party (section 3.2.1). Article 3:35 DCC can also give rise to other mutual information duties (section 3.2.2). These are defined by the reasonable expectations of the parties involved, as the relevant case law illustrates (section 3.3.1 et seq.).

Information duties also play a role in questions of unauthorized representation (section 3.4.1 et seq.). Article 3:61 paragraph 2 DCC, which protects a party who reasonably believed an agent to be authorized, refers to mutual information duties of the principal and the other party (section 3.4.2). These are defined by the reasonable expectations of the parties involved, depending on (inter alia) the appointment of the agent, the usualness of his representative act and the recognizability of the (lacking) authorization (section 3.4.3). The statutory requirement of causation by the principal ('toedoen'), as codified in article

3:61 paragraph 2 DCC, remains the guiding principle in cases of unauthorized representation (section 3.4.5).

Grounds of invalidity (vitiated consent)

The validity of contracts is influenced by information duties as well, especially in cases of vitiated consent. Article 3:44 paragraph 4 DCC, concerning undue influence, refers to a *duty to investigate* the intention of a party entering into a contract as a result of special circumstances. This duty depends in particular on the foreseeability of prejudice from the perspective of the responsible party. Moreover, article 3:44 paragraph 5 DCC can give rise to a duty to investigate the possibility of vitiated consent caused by a third party (section 3.5.1). Article 3:44 paragraph 3 DCC, concerning fraud, also provides a statutory basis for mutual information duties (section 3.5.3).

The most important foundation of precontractual information duties is article 6:228 DCC, concerning error. During the twentieth century, Dutch case law gradually abandoned the idea of error as a sole question of vitiated consent, and increasingly paid attention to the defendant's conduct as the cause of the error. This resulted in a two-sided approach, based on the reasonable expectations of the parties involved (section 3.5.4).

Article 6:228 paragraph 1b DCC stipulates that a contract may be nullified if the defendant should have informed the party in error. Thus, the article refers to a precontractual *duty of disclosure* ('mededelingsplicht'). This duty can be assumed if the defendant at the time of the conclusion of the contract knew or could reasonably be expected to know (i) the facts about which the other party was in error, (ii) the causal link between this error and the conclusion of the contract – i.e. the importance of the relevant information – and (iii) the possibility of an error (section 3.6.1). The knowledge of the responsible party, which is at stake when applying these three basic requirements, should only be objectified in a limited sense (section 3.6.2). The assumption of a duty to investigate as a consequence of the duty of disclosure (an 'obligation de s'informer pour informer') is undesirable (section 3.6.4).

Apart from these three basic requirements, the assumption of a precontractual duty of disclosure under article 6:228 paragraph 1b DCC depends on a comprehensive, contextual assessment of common opinion ('verkeersopvattingen'). The individual circumstances are decisive, as the relevant case law illustrates (section 3.7.1 et seq.). In particular, three factors are important when answering the question whether the responsible party, according to common opinion, is obliged to share his knowledge with the other party. These factors are: the *nature of the legal relationship* between the parties, the *nature of the information* to be disclosed and the *nature of the interests involved* (section 3.6.3).

Compliance with a duty of disclosure under article 6:228 paragraph 1b DCC implies, according to the Dutch Supreme Court decision in the case Gomes/Rental, that the information provided must be sufficiently clear. This

means that the information should be provided in such a way, that the party in error can be expected (i) to notice the information (formal clarity) and (ii) to understand the information and act accordingly (substantive clarity). The duty of disclosure therefore has a wide scope, but it does not intend to *guarantee* well-informed behaviour (section 3.6.5).

Article 6:228 paragraph 1a DCC stipulates that a contract may be nullified if the error is due to information given by the other party. Thus, the article refers to a *duty of truthfulness* ('waarheidsplicht'), which obliges the defendant to inform the mistaken party correctly about relevant matters. However, not each form of incorrect information can cause the contract to be nullified. The mistaken party for his part has a *duty to investigate*, which obliges him – to a certain extent – to verify the information provided (section 3.6.6).

Article 6:228 paragraph 1c DCC, concerning mutual error, stipulates that a contract may be nullified if both parties made the same incorrect assumption in entering into the contract. Thus, the article provides a basis for mutual information duties. In particular, it refers to a possible *duty to investigate* on the part of the defendant. Yet such a duty can only be accepted under exceptional circumstances (section 3.6.9). The outcome will depend on a contextual assessment of common opinion, in the light of the three factors mentioned in section 3.6.3.

The duty of disclosure, the duty of truthfulness and the duty to investigate are complemented by their counterpart, the *duty to investigate* of the party in error. This duty is expressed in article 6:228 paragraph 2 DCC, which stipulates that the nullification of a contract cannot be based on a mistake which should remain for the account of the party in error, in the light of common opinion. Whether the mistaken party has a duty to investigate, depends on the scope of the defendant's information duty, and *vice versa* (section 3.6.11).

Thus, the mutual information duties in cases of error should be qualified as complementary duties, i.e. as mutual counterparts (section 3.6.13). This 'digital' approach is preferable to the 'analogous' approach chosen by the majority of Dutch authors, according to which the mutual information duties in cases of error function as independent factors, overlapping each other mutually (section 3.6.14).

According to the case law of the Dutch Supreme Court, the relationship between the mutual information duties in cases of error is determined by two priority rules. First, the mistaken party may generally rely on the correctness of the information provided by the other party, i.e. the duty of truthfulness usually prevails over the duty to investigate of the mistaken party (section 3.6.15). The same goes for the duty of disclosure, which – according to the case law of the Dutch Supreme Court – aims at the protection of careless contracting parties and therefore usually prevails over the duty to investigate of the mistaken party (section 3.6.16). These two priority rules do not qualify as actual legal rules. They are only meant as general instructions to the courts deciding questions of fact (section 3.6.17). Insofar as the Dutch Supreme Court,

by applying these rules, means to force such courts to argue their decisions even more amply, if they choose to let the duty to investigate of the mistaken party prevail, this approach is undesirable. The priority rules are only intended to regulate the judicial debate, which means that a party who is accused of breaching an information duty cannot defend himself solely by referring to the duty to investigate of the party in error (section 3.6.18).

Interpretation, contents and effects of contracts

Apart from the formation and the validity of contracts, the legal effects of contracts can be affected by precontractual information duties as well. First, the interpretation of a contract may be influenced by *duties to investigate* the meaning of a certain contractual clause, in particular if the other party had reasons to doubt the supposed meaning (section 3.8.2). On the other hand, a party who stipulated an unclear clause, can also have a *duty of disclosure* about the intended meaning, in particular if he is a professional contracting with a consumer (section 3.8.3).

Article 6:248 paragraph 1 DCC stipulates that a contract not only has the legal effects agreed to by the parties, but also those which apply by virtue of the requirements of reasonableness and fairness. Moreover, paragraph 2 stipulates that a contractual clause does not apply insofar as this would be unacceptable according to standards of reasonableness and fairness. The added value of reasonableness and fairness in this context – after the interpretation of the contract, which is influenced by reasonableness and fairness as well – is that they create the possibility to take into account circumstances that occurred *after* the conclusion of the contract (section 3.8.6). Expanding or restricting the legal effects of contracts by means of information duties should not affect the core of the contractual relationship (sections 3.8.7, 3.8.8).

Performance and nonperformance (remedies)

The *performance* of contracts, especially the extinctive effect of payments, as governed by article 6:34 DCC, can be affected by information duties as well. Normally, the debtor does not need to make thorough inquiries into the authorization of the recipient of the payment. However, if the debtor has reasons to doubt the authorization, he is – against the background of article 3:11 DCC, concerning good faith – charged with a *duty to investigate* (section 3.9.2). Depending on the circumstances of the case, article 6:34 DCC can give rise to mutual information duties of the debtor and the creditor.

The *nonperformance* of contracts can be affected by information duties in two different ways. Information duties that are part of the actual contents of the contract, i.e. that qualify as contractual obligations, can constitute a breach of contract directly. Precontractual information duties, however, can contribute to a breach of contract indirectly (section 3.10.1).

The view of the majority of Dutch legal authors, that precontractual information duties must be treated equally in cases of error and nonperformance (section 3.10.2), deserves support. Nevertheless, the *effect* of information duties in cases of error and nonperformance may vary, depending on the circumstances. Informational failures as meant in article 6:228 paragraph 1 DCC can cause the contract to be nullified, but do not automatically lead to a breach of contract, while the absence of such failures does not necessarily imply correct performance of the contract (section 3.10.3).

Liability for breach of precontractual information duties (section 3.10.5 et seq.) is generally based on article 6:162 DCC, concerning unlawful act. The violation of a precontractual duty of disclosure (article 6:228 paragraph 1b DCC) or duty to investigate (article 6:228 paragraph 1c DCC) automatically qualifies as an attributable unlawful act. Violation of a precontractual duty of truthfulness (article 6:228 paragraph 1a DCC) creates an evidential presumption of unlawfulness. Since precontractual information duties aim to promote informed consent (section 2.3.3), violation of these duties can only lead to damages relating to the fact that the mistaken party has negotiated a contract based on incorrect or incomplete information. Liability therefore does not concern the so-called 'positive contractual interest', i.e. the profits the mistaken party, based on his erroneous assumption, hoped to make (section 3.10.6). It is not advisable to base liability for breach of precontractual information duties on article 6:74 DCC, concerning breach of contract, unless the contractual terminology appears perfectly natural under the given circumstances. Anyhow, the choice of article 6:74 or 6:162 DCC as a basis for liability should have no substantive consequences (section 3.10.7).

The *attribution* of a breach of contract under articles 6:74 and 6:75 DCC can be affected by information duties as well. Article 6:75 DCC, concerning *force majeure*, provides a basis for mutual information duties of the debtor and the creditor. According to common opinion ('verkeersopvattingen'), as mentioned by the article, the debtor who wishes to remain protected from the legal consequences of a foreseeable impediment of performance, should investigate this impediment and inform the creditor about it (section 3.10.9).

Books 7 and 7a of the Dutch Civil Code, governing specific contracts, refer to various information duties. Some of them qualify as contractual obligations, while others can be classified as precontractual or post-contractual information duties (section 3.11.1). The requirement of *conformity* in the field of the sale of goods, as codified in article 7:17 DCC, refers to the reasonable expectations of the buyer. Thus, the requirement of conformity provides a basis for a precontractual duty to investigate the properties of the purchased goods on the part of the buyer. This duty (inter alia) depends on the information provided or concealed by the seller. Therefore, the precontractual information duties within the scope of error also affect the requirement of conformity. In both legal doctrines, the information duties should be treated equally (section 3.11.8).

Termination of negotiations

Precontractual liability for the termination of contractual negotiations is influenced by information duties as well. According to the Dutch Supreme Court decision in the case CBB/JPO, breaking off negotiations may, depending on the circumstances, be unacceptable because of the reasonable expectations of the other party regarding the conclusion of the contract (section 3.12.1). The resulting precontractual liability – which should be based on article 6:162 DCC, governing unlawful acts (section 3.12.2) – may in some cases be related to the violation of an information duty by the party breaking off the negotiations. Legal doctrine assumes that it is negligent to carry on negotiations while knowing that the other party makes no real chance (anymore) to win the contract, resulting in unnecessary costs made by the other party. Such a *duty of disclosure* relating to foreseeable impediments does not apply as a general rule. In particular, the *nature of the interests involved* and the *nature of the legal relationship* between the parties are relevant in this respect (section 3.12.3).

4 INFORMATION DUTIES IN LIABILITY LAW

Whereas the conclusion of a contract involves an inherent risk of disappointment, everyday life in society is not without risks either. Members of society can be expected to protect themselves and others to a certain extent against those risks (section 4.1.1). Like in contract law, individual autonomy serves as the guiding principle (section 4.1.2).

Liability arising from unlawful acts

Article 6:162 paragraph 1 DCC stipulates that a person who commits an unlawful act against another which is attributable to him, must repair the resulting damage. The article serves as an important basis for noncontractual information duties (section 4.2.1). More specifically, the requirements of unlawfulness, attributability and relativity (breach of a duty serving to protect the victim against the damage suffered) can give rise to noncontractual information duties (section 4.2.3). The requirement of unlawfulness, as codified in article 6:162 paragraph 2 DCC, is not always influenced by the 'informational context' of the harmful conduct. The first two categories of unlawfulness, infringement of a right (section 4.2.4 et seq.) and breach of a statutory duty (section 4.2.9), refer to 'objective' standards of unlawfulness. The attributable breach of these standards automatically creates liability, regardless of the knowledge of the injuring party and regardless of his possible warnings of the victim.

The third category of unlawfulness, *negligence*, i.e. breach of a rule of unwritten law pertaining to proper social conduct, serves as the most important

basis for noncontractual information duties. The duties of care which are at stake here, have a contextual nature. The unwritten law of proper social conduct demands that people not expose others to a greater risk than is reasonably justified under the given circumstances. In more specific terms, the outcome depends on the *reasonable expectations* on both sides (section 4.2.10). In applying this standard, the knowledge of the wrongdoer plays a crucial role. Negligence depends on the foreseeability of damage (section 4.2.11 et seq.).

Apart from the requirement of unlawfulness, noncontractual information duties can also play a role in the *attribution* of unlawful conduct under article 6:162 paragraph 3 DCC. In particular, the article can charge the wrongdoer with a *duty to investigate* or the victim with a *duty to warn*. The added value of these information duties is especially evident in the field of infringement of a right and breach of a statutory duty, the two 'objective' categories of unlawfulness (section 4.2.16).

Information duties under article 6:162 DCC

Although the noncontractual *duty to warn* ('waarschuwingsplicht') originally used to be applied in a negative sense, as an unlawful conduct defence, nowadays it tends to be based directly on article 6:162 paragraph 2 DCC, as an independent duty of care. This means that in case of injury resulting from dangerous activities, the victim has to prove that the wrongdoer behaved negligently, whereas the wrongdoer has to prove that he warned the victim or that a warning would not have prevented the injury (section 4.3.1).

When applying the noncontractual duty to warn, the contractual doctrine of error can serve as a useful point of reference. The basic requirements for a precontractual duty of disclosure under article 6:228 paragraph 1b DCC can be 'translated' into noncontractual terms (section 4.3.2). Thus, a duty to warn can be assumed if the wrongdoer knew or ought to know about (i) the danger he needed to warn for, (ii) the potential damage as a result of it and (iii) the possibility of inadvertence on the part of the victim.

These three basic requirements refer to the foreseeability of damage, as discussed in section 4.2.11. Like in the doctrine of error (section 3.6.2), the knowledge of the responsible party, which is at stake when applying the three basic requirements, should only be objectified in a limited sense. The assumption of a duty to investigate as a consequence of the duty to warn is undesirable (section 4.3.3).

Apart from the three basic requirements, the assumption of a noncontractual duty to warn under article 6:162 DCC depends on a comprehensive, contextual assessment of generally accepted standards (section 4.3.2). The individual circumstances are decisive, as the relevant case law illustrates (section 4.4.1 et seq.). In particular, three factors are important when answering the question whether the wrongdoer, according to generally accepted

standards, is obliged to warn potential victims. These factors are, like in the doctrine of error (section 3.6.3): the *nature of the legal relationship* between the parties, the *nature of the information to warn for* and the *nature of the interests involved* (section 4.3.4). The third factor is elaborated in the well-known 'Kelderluikfactoren', the Dutch equivalent of the *Learned Hand-formula* (section 4.3.5 et seq.).

Compliance with a duty to warn under article 6:162 DCC implies, according to the Dutch Supreme Court decision in the Jetblast case, that the warning should be framed in such a way that it can be expected to prevent the danger from materialising. In other words, the *likely effectiveness* of the warning is decisive. This standard does not imply, as is sometimes suggested in legal doctrine, that a warning should always have effective power, regardless of the individual circumstances (section 4.3.7).

Apart from the noncontractual duty to warn, generally accepted standards can also give rise to a *duty to investigate* on the part of the wrongdoer. Like the duty to warn, this duty depends on the foreseeability of damage. More specifically, a noncontractual duty to investigate can only be assumed if the wrongdoer knew or ought to know about the *possibility* of damage as a result of the materialisation of danger (section 4.3.9). Apart from this basic requirement, a contextual assessment of generally accepted standards is needed (section 4.3.10).

In noncontractual liability law, the victim also has his own responsibility in respect of the gathering of information. No duty to warn exists, if the wrongdoer could reasonably expect the victim to know the risks involved and to behave accordingly. Consequently, the victim may – depending on the circumstances – be charged with a *duty to investigate* foreseeable dangers. This duty serves as the logical counterpart of the duty to warn (section 4.3.12). As a result, the wrongdoer does not need to warn the victim for *generally known risks*, i.e. risks that are so obvious, that all members of society may be expected to know them (section 4.3.13).

Against this background, the mutual information duties under article 6:162 DCC – i.e. the wrongdoer's duty to warn on the one hand and the victim's duty to investigate on the other hand – should be qualified as complementary duties, in the sense that the duty of the wrongdoer ends where the duty of the victim begins, and *vice versa*. In the case Eurosportief/Wesselink, the Dutch Supreme Court suggested that there is a potential overlap between the wrongdoer's duty to warn and the victim's duty to investigate, similar to the overlap between the duty of disclosure and the duty to investigate in the doctrine of error. Given the dangers of 'commonsense warnings' this approach is undesirable (section 4.3.15). Also in the field of contributory negligence (article 6:101 DCC) a 'digital' approach to the mutual information duties is to be preferred. In other words, the failure of a victim to investigate risks of which the wrongdoer should have warned him, does not qualify as contributory negligence (section 4.3.16).

Strict liability

The strict liabilities of chapter 6.3.2 DCC can be considered as logical corollaries of the unwritten safety standards from the doctrine of negligence. However, since they are strict liabilities, they do not require unlawfulness and attribution in the same way as article 6:162 DCC does. The 'informational context' of the harmful conduct – i.e. the foreseeability of damage and the need to warn potential victims, in the light of their own responsibility – is less relevant in this context. Nevertheless, the strict liabilities of chapter 6.3.2 DCC are still significantly affected by the fault principle (section 4.5.1).

Accordingly, the strict liabilities for dangerous things – defective movables (article 6:173 DCC), defective immovables (articles 6:174 DCC) and defective products (article 6:185) – are subjected to a requirement of *foreseeability*. This means that no strict liability exists, if the possibility of damage was objectively unknown until the realization of the danger (section 4.5.5). Moreover, the importance of the informational context is demonstrated by the fact that articles 6:173, 6:174 and 6:185 DCC can give rise to *information duties* on the part of the possessor of the (im)movable or the producer of the product (sections 4.5.2, 4.5.3 and 4.5.7). These information duties follow from the statutory requirement of defectiveness ('gebrekkigheid'). On the other hand, the victim also has his own responsibility, in the sense that he has to anticipate generally known risks. The strict liabilities therefore do not qualify as guarantee standards (section 4.5.9).

For all that, the informational context does not play the same role in the field of strict liabilities as in the field of negligence. The contextual safety assessment, prescribed by the statutory criterion of defectiveness, does not refer to the conduct of the defendant, but to the safety of the (im)movable or product involved. The added value of this 'objective' approach is especially evident in cases of hidden safety defects (sections 4.5.5, 4.5.9).

Employer's liability

Article 7:658 paragraph 1 DCC, concerning employer's liability, stipulates that an employer is obliged to take all reasonable measures to prevent the employee from suffering damage in the course of his work. Paragraph 2 adds that a breach of this duty makes the employer liable. Thus, the emphasis is on the employer's duty of care instead of on the employee's own responsibility (section 4.6.1). The article can give rise to a *duty to investigate* the safety of the working environment on the part of the employer (section 4.6.2). Furthermore, the employer has to take into account a considerable degree of carelessness on the part of his employees. Accordingly, the Dutch Supreme Court has ruled in relation to article 7:658 paragraph 1 DCC that *physical safety measures* are to be preferred to warnings. If the employer, however, warns his employees instead of taking other measures, he must ensure that his instructions are

respected by the employees (section 4.6.3). All the same, according to established case law article 7:658 DCC does not qualify as a guarantee standard for the safety of the working environment. The employee, too, has a responsibility, especially in relation to generally known risks, with which he is familiar outside the working environment also (section 4.6.3).

Unfair commercial practices and misleading advertising

Section 6.3.3A DCC, concerning unfair commercial practices, and Section 6.3.4 DCC, concerning misleading and comparative advertising, aim to prevent traders from providing incorrect or incomplete information to the public (section 4.7.1). Article 6:193b paragraph 3 DCC refers to *misleading commercial practice* as a form of unfair commercial practice. Not only the supply of incorrect information (article 6:193c paragraph 1 DCC), but also the supply of incomplete information (article 6:193d paragraph 1 DCC) qualifies as a misleading commercial practice. A misleading omission exists, according to article 6:193d paragraph 2 DCC, in case of the concealment of 'essential' information (section 4.7.2).

Article 6:194 DCC stipulates that a trader who publishes misleading information regarding goods or services offered by him, acts unlawfully against his competitors. The misleading nature of advertising can result not only from incorrectness, but also from incompleteness (section 4.7.2).

The unfair or misleading nature of commercial communication must be assessed in the light of the presumed expectations of the 'average consumer'. This standard, derived from the well-known Gut Springenheide case of the European Court of Justice, is relatively strict. Consumers have a *duty to investigate*, meaning that they may not superficially and uncritically accept what is presented to them by traders. Compared to the doctrine of error, the assessment of an unfair or misleading nature is more abstract, because unfair commercial practices – like misleading and comparative advertising – usually involve mass communication (section 4.7.3).

Liability of service providers (professional liability)

The liability of professionals and (other) service providers can be both of a (pre)contractual and of a noncontractual nature. According to established case law, professional service providers have a *duty of care*, meaning that they must behave in accordance with the diligence that may be expected from a reasonably competent and reasonably acting colleague (section 4.8.1). This duty of care can, depending on the circumstances, give rise to information duties (section 4.8.2).

A special duty of care is to be observed, as follows from established case law, by financial service providers, such as banks and investment managers. This special duty of care aims to prevent financial consumers from running

disproportionate financial risks. In the field of options trading and share leasing, the Dutch Supreme Court has indicated that the special duty of care of financial service providers aims to protect clients against their own rashness or lack of competence (section 4.8.3). Providers of options trading are even charged with a statutory *duty to refuse* if the client violates his so-called margin requirement (section 4.8.4).

In the field of share leasing, the Dutch Supreme Court has indicated that the special duty of care of financial service providers results in a *duty to warn* clients of the risk of a residual debt as inherent in share leasing, a *duty to investigate* the financial position of the clients and to *advise* them on that point. The said duty to warn has, according to the Dutch Supreme Court, a wider scope than the general duty of disclosure under article 6:228 paragraph 1b DCC, in the field of error. There seems to be no convincing foundation of this two-track approach (section 4.8.5). The special duty of care of financial service providers should be applied on a case-by-case basis, taking into account the whole context of the legal relationship between the financial service provider and his client. In particular, the fact that share investors characteristically pursue gains deserves more attention as a factor for the interpretation of the special duty of care of financial service providers (section 4.8.6).

5 COMPREHENSIVE ANALYSIS

From an overall perspective, three general issues concerning (pre-)contractual and noncontractual information duties deserve particular attention: human knowledge as the basis of legal responsibility (section 5.2), the role of information duties in the law of obligations and the way they are applied by the courts (section 5.3), and finally the conflict between autonomy and altruism, against the background of the distinction between contract law and noncontractual liability law (section 5.4).

Knowledge and responsibility

The present study shows the importance of human knowledge as the basis of responsibility in the law of obligations (section 5.2.1). Generally speaking, three levels of knowledge can be distinguished. First: subjective knowledge, i.e. what individuals actually *know or may be presumed to know*. Second: objectified knowledge, i.e. what individuals legally *ought to know*. Third: purely objective knowledge, i.e. what is *objectively known* (section 5.2.2). The practical relevance of this distinction lies in the field of judicial evidence. Since only facts need to be proved, and no normative qualifications (*juridica non sunt probanda*), the burden of proof only relates to the first and the third level of knowledge. The second level rather asks for legal reasoning instead of factual evidence (section 5.2.3).

Objectivation – the process of constructing objectified knowledge of the second level – means that the responsible party is judged on the knowledge he ought to have, from a legal point of view. Objectivation requires a contextual reasoning, taking into account the circumstances of the case. However, the court may not confine its judgement to an indiscriminate reference to the individual circumstances. As far as possible, the court should make explicit its selection of subjective and objective circumstances (section 5.2.4).

In general, two types of objectivation can be distinguished. First: *person-related objectivation*, which means that the objectified knowledge is related not to the responsible party himself, but to somebody else. Second: *knowledge-related objectivation*, which means that the objectified knowledge is related not to the actual knowledge of the responsible party, but to another kind of knowledge (section 5.2.5). Knowledge-related objectivation can result in the application of a *duty to investigate*, namely if the objectified knowledge is related to (supposed) information which the responsible party does not know yet, but needs to find out through further research. A special variant of the knowledge-related objectivation is *generalization*, meaning that the objectified knowledge is related to general notions rather than specific facts (section 5.2.6). Person-related objectivation is, unlike knowledge-related objectivation, aimed at identifying the knowledge *other* people could expect on the part of the responsible party. Thus, person-related objectivation can be described as a form of *imputation of knowledge* (section 5.2.6).

Imputation of knowledge of officials to companies and institutions is governed by the so-called *identification standard*, as adopted in the Babbel judgement of the Dutch Supreme Court. According to this standard, imputed knowledge can be assumed if the official's knowledge, pursuant to generally accepted standards, counts as knowledge of the company or institution involved. As appears from the Dutch Supreme Court decision in the case Ontvanger/Voorsluijs, the identification standard may not be used for the imputation of 'external' knowledge, i.e. the knowledge of people *outside* the company or institution involved. Article 3:66 paragraph 2 DCC, referring to the 'doctrine of the greatest contribution' in the field of representation, provides a suitable standard for situations similar to representation. From a broader perspective, the principle of *reasonable reliance* (protection of legitimate expectations) should be decisive as a comprehensive standard for the imputation of knowledge (section 5.2.7).

Information duties

Information duties represent the connecting link between knowledge and responsibility in the law of obligations (section 5.3.1). The power of information duties as a judicial instrument lies in their flexibility (i.e. their contextual nature) and manageability (i.e. their usability in different parts of the law). Both powers have a downside. *Flexibility* bears the risk of unpredictable

outcomes. Be that as it may, the specific context should never be overlooked when applying information duties. There is no need to fear 'Einzelfallgerechtigkeit', as long as the courts strike an adequate balance between standards and facts. *Manageability*, the second power of information duties, bears the risk of unbridled application. The Dutch professor Jan Vranken rightly pointed out that information duties are able to swallow other doctrines of the law of obligations. This 'absorbing effect' of information duties – the fact that they cut straight across doctrinal divisions – is not always desirable. The primary purpose of information duties is – and should remain – limited to the judgement in individual cases (section 5.3.1).

When applying information duties, the starting point should be that in principle people are responsible for their own well-informed behaviour. Therefore the ignorant party who accuses the defendant of breaching an information duty, is bound to provide the arguments which support this claim (section 5.3.2).

The basic requirements and factors for the application of a precontractual duty of disclosure under article 6:228 paragraph 1b DCC, in the field of error, point towards a *model* for the application of any duty to provide information. In short, precontractual duties of disclosure and noncontractual duties to warn can be assumed provided that: (i) the responsible party *knew or could reasonably be expected to know* the relevant information and its importance (section 5.3.3) and furthermore (ii) the ignorant party could *reasonably expect* to be informed on that matter (section 5.3.4), given the circumstances of the case, more specifically the nature of the legal relationship between the parties, the nature of the relevant information and the nature of the interests involved (section 5.3.5).

This model implies that the ignorant party can be charged with a *duty to investigate*, especially if he had reasons to doubt the supposed state of affairs. Guided by the reasonable expectations of both parties, the mutual information duties should be qualified as complementary duties, i.e. as mutual counterparts. This means that the responsibility of the ignorant party begins where the responsibility of the other party ends, and *vice versa*. Such a 'digital' approach promotes the clarity of legal judgements (section 5.3.6).

The content of information duties – i.e. the degree to which they oblige the responsible party to provide information – should be determined equally in contract law and noncontractual liability law. The noncontractual standard from the Jetblast case, referring to the *likely effectiveness* of the provision of information, can be applied by way of analogy in contract law too (section 5.3.7).

According to article 150 of the Dutch Code of Civil Procedure, the ignorant party who accuses the defendant of breaching an information duty, bears the *burden of proof*. If the ignorant party argues that he was not informed at all by the defendant, the court deciding questions of fact could reverse the burden of proof, or could require the defendant to indicate more specifically what kind of information he (allegedly) provided to the ignorant party. The best

way to actually *prove* the provision of information, is by letting the ignorant party sign a written receipt (section 5.3.7).

Autonomy or altruism?

As a result of the application of information duties, ignorant parties enjoy a high degree of protection in the law of obligations. This does not mean, however, that the protection of ignorant parties has been made to a *rule*. Historically and to this day, information duties are determined by the principle of *autonomy*, since they aim to promote well-informed behaviour. Duties to provide information can only be assumed, if the ignorant party, given the circumstances of the case, could reasonably expect to be informed (section 5.4.1).

The rise of generally formulated *duties of care* ('zorgplichten') in the law of obligations seems to be in contrast with the foregoing. Unlike the idea of contextual protection, these duties of care aim at categorical 'mass justice'. Duties of care are said to represent a 'basic standard' of the law of obligations or an 'overarching principle', which connects the different areas of the law. The question arises if the same goes for information duties. In particular, it is to be considered if there is room for a synthesis of information duties within the law of obligations as a whole, i.e. if precontractual information duties and noncontractual information duties can be treated equally (section 5.4.2).

At first sight, precontractual and noncontractual information duties differ in terms of remedies. The different remedies for breach of information duties are, however, not essential to their material content (section 5.4.3). Two other apparent differences, relating to the (in)voluntariness of the legal relationship involved (section 5.4.4) and the (non-)reciprocity of the interests involved (section 5.4.5), can have no decisive consequences as to the content of information duties either. In the end, the precontractual or noncontractual nature of information duties should not play a role when applying them in individual cases, unless it is combined with circumstances that influence the assessment of what parties might reasonably expect from each other in terms of the provision or gathering of information (section 5.4.5).

The question arises what this synthesis of precontractual and noncontractual information duties, as argued above, means for the doctrinal division between contract law and noncontractual liability law. Legal doctrine assumes – and accepts – that the boundaries between these two fields of the law are blurred nowadays, resulting in a 'fluent' law of obligations. Still, it seems an overstatement to say that information duties respresent a 'basic standard' or an 'overarching principle' of the law of obligations. Rather, I would consider information duties as the contextual outcome of unwritten private law (section 5.4.6). Although certain areas of the law of obligations, partly under the influence of information duties, do develop into a kind of 'duty-of-care law', there is in my opinion no reason to conclude that the traditional dichotomy of the law

of obligations – the distinction between contract law and noncontractual liability law – is outdated.